Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act	)	
Competitive Bidding	)	

To: The Commission

PETITION FOR RECONSIDERATION

COOK INLET REGION, INC.

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Dated: May 20, 1994

SUMMARY

Cook Inlet Region, Inc. ("CIRI") files this Petition for Reconsideration of the Commission's rules to implement competitive bidding for spectrum-based licenses. Specifically, CIRI raises three principal concerns regarding the measures adopted in the Commission's Second Report and Order.

First, CIRI demonstrates that the Commission must reconsider its decision to limit the availability of designated entity installment payments to small businesses bidding for small spectrum blocks. Congress plainly intended that an installment payment option be available for all eligible designated entities and the Commission must provide that option so that eligible entities can have a meaningful opportunity to participate in the provision of spectrum-based services.

Second, if the Commission sets aside spectrum for designated entities, CIRI urges the Commission to provide a greater spectrum allocation than that specified in the Notice of Proposed Rulemaking. A greater spectrum allocation is needed to ensure that designated entities are not confined to isolated service opportunities in limited spectrum bands. Similarly, the Commission must ensure that preferences are available for eligible designated entities bidding on all auctionable spectrum — not simply set-aside spectrum — to ensure meaningful designated entity participation.

Third, CIRI urges the Commission to adopt strict eligibility and antisham measures to see that only legitimate designated entities receive the preferential treatment mandated by Congress. Specifically, the Commission should limit the availability of preferences to businesses owned by those who are disadvantaged. This limitation would comport with the intent of Congress to assist entities that are disadvantages and would ensure that preferences are available only to those entities that truly need enhanced opportunities. In addition, CIRI urges the Commission to establish a stringent antisham program. Such a program would require documentation in support of a claim of designated entity status and would establish penalties for willful misrepresentations to the Commission.

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Cook Inlet Region, Inc. ("CIRI"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, submits this Petition for Reconsideration of the above-captioned Second Report and Order[1] adopted by the Commission on March 8, 1994 and released on April 20, 1994.

I. INTRODUCTION

CIRI is one of the thirteen Regional Corporations established by Congress under the terms of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 et seq. (1988) ("ANCSA"). CIRI is owned by approximately 6,700 Athabascan, Eskimo, Aleut, Haida, Tlingit and other Native American shareholders. A majority of those shareholders are women.

Under definitions applied by the Small Business Administration ("SBA") CIRI's shareholders are both "socially" and "economically disadvantaged" for purposes of

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[1] Implementation of Section 309(j) of the Communications Act Competitive Bidding, Second Report and Order, FCC 94-61 (rel. April 20, 1994) ("Second Report and Order").

applying SBA rules and regulations.[2] Accordingly, CIRI has a vital interest in ensuring that the enhanced opportunities for businesses owned by those who are disadvantaged to participate in spectrum-based services mandated by Congress[3] are reflected in the Commission's final auction scheme. To that end, CIRI filed Comments and Reply Comments in this proceeding regarding the application of the minority preference provisions proposed by the Commission in its Notice of Proposed Rulemaking.[4]

In this Petition for Reconsideration, CIRI raises three principal concerns regarding the measures adopted in the Second Report and Order. First, CIRI demonstrates that the Commission must reconsider its decision to limit the availability of designated entity installment payments to small businesses bidding for small spectrum blocks. Second, if the Commission sets aside spectrum for designated entities, CIRI urges the Commission to provide a greater spectrum allocation than that specified in the NPRM and to ensure that preferences are available on all spectrum blocks. Third, CIRI shows the need for more developed

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[2] See 13 C.F.R. § 124.105 (1993); 43 U.S.C.A. § 1626(e) (West Supp. 1993).

[3] See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387 (1993) ("Budget Act").

[4] Implementation of Section 309(j) of the Communications Act Competitive Bidding, Notice of Proposed Rulemaking, 8 FCC Rcd 7635 (1993) ("NPRM").

eligibility and antisham measures to ensure that only legitimate designated entities receive the preferential treatment mandated by Congress.

II. THE INSTALLMENT PAYMENT MEASURES ADOPTED BY THE COMMISSION MUST BE AVAILABLE TO ALL DESIGNATED ENTITIES BIDDING FOR ALL SERVICE AREAS

In the Second Report and Order the Commission elected not to offer installment payment plans to all entities designated by Congress for preferential measures. Instead, the Commission chose to limit the availability of installment payments to small businesses bidding for small blocks of spectrum. Second Report and Order, at ¶¶ 236-37. In so doing, the Commission plainly departed from the objective of Congress to afford preferences to each of the entities designated in the Budget Act.

New section 309(j)(4)(A) of the Communications Act directs the Commission to:

> consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods.

Budget Act, 107 Stat. at 389 (emphasis added). In turn, section 309(j)(3)(B) directs the Commission to adopt measures

> promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of

> applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.

Id. at 388 (emphasis added).

Thus, under the law enacted by Congress, installment payments are to be used in such a way as to disseminate "licenses among a wide variety of applicants," including small businesses and businesses — whether large or small — owned by members of minority groups. Although Congress gave the Commission liberty to consider a variety of preferential measures, it did not give the Commission the liberty to select the beneficiaries of those preferences from among the enumerated groups. For example, if Congress had intended to limit the availability of installment payments to "small businesses owned by members of minority groups" or to "small businesses bidding for small service areas," it could have done so. It did not do so, however, and the Commission departed from the objectives of Congress when it limited this preference to small businesses bidding for small markets.

Moreover, Congress directed the Commission to ensure that designated entities are given the opportunity to participate in the provision of spectrum-based services by way of the preferential measures set forth in the Budget Act. A minority-owned business too large to qualify as small under the definition adopted in the Second Report and Order might well still be denied a meaningful opportunity to

participate in the provision of spectrum-based services. Given the capital-intensive nature of the services subject to auction — such as personal communications services ("PCS") — a company with a net worth in excess of $6 million and average net income in excess of $2 million can very easily be foreclosed from bidding on all but the smallest spectrum blocks in the most limited markets.[5] Indeed, the Commission acknowledges that even the Chief Counsel for the SBA views the $6 million/$2 million size standard as infeasible for the services at issue. Second Report and Order, at ¶ 268.

In short, Congress directed the Commission to consider the use of installment payments for all entities designated by Congress for preferential measures. Nowhere in the Budget Act is the Commission authorized to limit the availability of installment payment plans to small businesses or to small businesses bidding for small spectrum blocks.

Accordingly, the Commission must reconsider the scope of the installment payment plan announced in the Second Report and Order and craft a new provision that offers the financing option to each qualified designated entity and for every service area. If it fails to do so, the Commission will exclude a substantial number of designated entities

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[5] This is particularly the case if the installment payment option is restricted to the smallest service areas.

from meaningful participation in the provision of spectrum-based services.

III. ANY SPECTRUM SET-ASIDES MUST BE BROAD AND PREFERENCES SHOULD BE AVAILABLE FOR ALL AUCTIONABLE SPECTRUM

The Commission proposed in the NPRM to set aside one 20 MHz PCS spectrum block (Block C) and one 10 MHz PCS spectrum block (Block D) exclusively for designated entity bidding. Each of the blocks would be classified for BTA service. The purpose of this set-aside would be to ensure that designated entities will participate in spectrum-based services as mandated by Congress and will not have to bid against other parties that do not need special measures under Section 309(j)(4)(D). NPRM, at 7655.

A. Any Set-Asides Adopted Must be Broader Than Those Proposed

While CIRI supports the general concept of a set-aside, the set-aside of only one 10 MHz PCS block and one 20 MHz PCS block would create a spectrum ghetto for minorities because those bands simply are economically inadequate by themselves for viable PCS service.

First, the 10 MHz set-aside is inadequate on its face to provide viable PCS service. As Commissioner Barrett observed in his Separate Statement on the NPRM: "I continue to be concerned about the additional complexity of aggregating several 10 MHz slivers of spectrum in order to get to a point where one can start a viable, economic PCS service. . . . [B]idders will be required to bid for at

least two 10 MHz licenses before they can start any PCS service that will provide at least 70-80% coverage of BTAs in major markets."[6] Commissioner Barrett's dissent in the PCS Order[7] also is on point: "Until a more thorough band study is provided on 10 MHz allocations above 2 GHz, I question their feasibility in terms of geographic coverage and economic service."[8] For these reasons, the 10 MHz set aside will not fulfill the congressional purpose in directing the Commission to consider minority set-asides.

The 20 MHz block might be even more problematic. Again, Commissioner Barrett has highlighted the problem: "[T]he 20 MHz BTA block in the lower band . . . could become an 'albatross' allocation" because it "may not provide full geographic coverage from the start."[9] Moreover, because the Commission has limited to 40 MHz the maximum amount of PCS spectrum any PCS licensee may acquire, the holders of 30 MHz MTA blocks would be precluded from joining with minority

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[6] Separate Statement of Commissioner Andrew C. Barrett Re: Implementation of Section 309(j) of the Communications Act: Competitive Bidding, 8 FCC Rcd 7666, 7667 (1993).

[7] Amendment to the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, 8 FCC Rcd 7700 (1993) ("PCS Order").

[8] Dissenting Statement of Commissioner Andrew C. Barrett In Re: Amendment of the Commission's Rules to Establish New Personal Communications Services [Second Report and Order], 8 FCC Rcd 7853, 7861 (1993).

[9] Id. at 7862-63 (footnote omitted).

holders of a set-aside 20 MHz block to provide service in an MTA.

In addition, the 20 MHz block is not particularly attractive to 10 MHz block holders — those who might be expected to seek aggregation with others — because not all of the bands are contiguous. Indeed, a 10 MHz licensee would be more apt to attempt to aggregate with the 30 MHz MTA licensee in a particular BTA to maximize the available spectrum up to the Commission's 40 MHz limit. Putting aside technical compatibility problems, the holders of the 20 MHz block also will have to overcome the concerns of other potential co-venturers about significant transaction costs if they are to participate in an economically viable PCS system.

Thus, 10 MHz and 20 MHz PCS set-asides, by themselves, will not achieve the congressional purpose to provide minorities with an enhanced opportunity to participate in spectrum-based services. For this reason, if the Commission adopts any spectrum set-asides, they must be sufficiently broad to generate meaningful opportunities for designated entities.

B. The Commission Must Ensure that Preferences are Available for All Auctionable Spectrum

Even if the Commission sets aside spectrum for designated entity-only bidding, the Commission must apply any installment payment, bidding credit, and tax certificate

policies to all auctioned spectrum blocks to fulfill Congress' mandate to enhance the participation of designated entities in the provision of spectrum-based services. Those preferences should not be limited to transactions affecting the set-aside blocks.

As noted above, the largest block of spectrum identified by the Commission as likely to be set aside for designated entities is the 20 MHz PCS Block C. Although the Block C spectrum is contiguous with the 30 MHz of spectrum in Block B, the 40 MHz aggregation limit announced by the Commission in the PCS Order[10] prevents the holder of a 30 MHz license from aggregating spectrum with a minority-held 20 MHz license. The result is a set-aside 20 MHz block classified for BTA service that cannot be joined to a larger system.

Thus, the Commission effectively will relegate minority businesses to highly insulated service opportunities unless it assists minority enterprises in competing for spectrum blocks other than those set-aside for minority bidding. Although minorities technically will be given the opportunity to participate in the provision of services in the set-aside spectrum, the quality of that participation will be limited by virtue of the spectrum block aggregation

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[10] PCS Order, at 7728.

ceiling and the other negative characteristics of the set-aside spectrum.

Affording preferences for transactions involving all auctionable spectrum will assist designated enterprises in competing for non-set-aside spectrum blocks. A winning minority enterprise will be able to offer a broader range of services with a 30 MHz license than with the set-aside 10 or 20 MHz licenses and, as a result, will be better able to attract capital from outside investors. Accordingly, designated entities should be entitled to bid for — and receive preferences in auctions for — spectrum in non-set-aside PCS spectrum blocks. Similarly, licensees who assign 30 MHz or other PCS licenses to designated entities should be eligible for tax certificates. In this way, the congressional mandate to ensure that businesses owned by minority group members have an opportunity to participate in the provision of spectrum-based services will be realized.

IV. THE COMMISSION MUST ADOPT STRICT ELIGIBILITY AND ANTISHAM PROVISIONS

CIRI demonstrated in its initial Comments and Reply Comments that adequate safeguards are necessary to ensure that the benefits of any auction preferences inure only to the groups that Congress intended to benefit. Those safeguards include strict designated entity eligibility requirements and anti-sham provisions that prevent groups

with no legitimate designated entity affiliation from benefitting from preferences adopted by the Commission.

A. The Commission Should Limit Preferential Measures to Disadvantaged Entities

The Commission noted in the Second Report and Order that it would consider additional eligibility tailoring mechanisms on a service-by-service basis in future reports and orders. Second Report and Order, at ¶ 297. The Commission must review that piecemeal approach and, instead, adopt eligibility requirements based on disadvantage for all preferences to be administered in the context of competitive bidding.

As CIRI noted in its Reply Comments, the Commission should supplement its existing eligibility requirements by limiting preferential measures to businesses owned by those who are disadvantaged. When Congress declared that small businesses and businesses owned by minorities and women should be assured meaningful participation in spectrum-based services, its goal was to ensure the participation of groups that are disadvantaged by the presence of unique barriers to their participation in the telecommunications industry. Those barriers are based on race, gender, and lack of access to financing, and are manifested in the vast underrepresentation of those designated entities in the industry.

Indeed, these circumstances are detailed in the September, 1993 Report of the FCC Small Business Advisory Committee ("SBAC"),[11] where the SBAC explains that each of the designated groups faces different but equally imposing barriers to entry into the telecommunications industry. See id. at 1-5. At bottom, then, it is the fact of disadvantage that unites these otherwise dissimilar groups, and it was the goal of Congress to see that disadvantaged entities find a place on the national information superhighway.

However, the approach detailed by the FCC in its Second Report and Order goes well beyond this intent. For example, the current approach would allow two of the largest media companies in the nation — with assets valued in billions of dollars — to be awarded special preferences at auction simply because they are owned and controlled by women.[12] These companies do not require special assistance, nor was that within the intent of Congress.

In creating a preference program that applies roughly to 60 percent of the population, the FCC has failed to narrowly tailor the benefits of the program to avoid substantial and prolonged constitutional litigation. The

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[11] Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding GEN Docket 90-314 (Sept. 15, 1993) ("SBAC Report").

[12] See Second Report and Order, at ¶ 277 (defining a woman-owned corporation as one in which a woman holds at least 50.1 percent equity and a 50.1 percent controlling interest).

intervening litigation will arrest the designated entity preference program and might well delay the introduction of competitive bidding generally. In that event, the benefits of an opportunity to participate in the provision of spectrum-based services will unnecessarily be delayed to congress' intended beneficiaries.

In its Reply Comments to the Commission, CIRI proposed a solution that goes to the heart of congressional intent. The Commission should adopt preferences to benefit those groups that are disadvantaged with respect to opportunities to participate in the provision of spectrum-based services. Under this system a preference would not be given solely on the basis of race or gender, nor would it be given solely on the basis of size. Rather, a preference would be given to an entity that could demonstrate that it was disadvantaged. In that way, the grant of a preference would comport with the intent of Congress while limiting the availability of Commission assistance to those entities that truly need an enhanced opportunity to participate in the provision of spectrum-based services.

Specifically, CIRI urges the Commission to employ the standards already established by the SBA for determining whether a business is "disadvantaged" for the purposes of admission to the SBA Minority Small Business and Capital Ownership Development Program, otherwise known as the "8(a)" program. These existing disadvantage standards would be

particularly useful to the Commission in establishing a preference system geared to the disadvantaged nature of the particular business entity, not simply to the size of the entity. The standards are set forth at 13 C.F.R. §§ 124.105 & 124.106 (1993). A copy of the SBA standards tailored for use by the FCC in competitive bidding is included with this petition as Appendix A.[13]

B. The Commission Should Establish Stringent Antisham Requirements

In the Second Report and Order the Commission adopted a limited designated entity certification requirement to be included in a prospective bidder's short-form application. Second Report and Order, at ¶ 166. That provision would require the bidder simply to affirm that it is qualified as a designated entity under the Commission's eligibility rules. As CIRI discussed in its initial Comments to the FCC, however, a much more stringent antisham requirement is needed.

The FCC has recognized that "the search for control necessarily calls for an investigation beyond stock ownership in order to determine effectively where actual control resides."[14] An analysis of de facto control

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[13] Appendix A includes (1) the regulations proposed by CIRI for use by the Commission, and (2) a marked-up version showing how those proposed regulations differ from the current SBA regulations.

[14] Stereo Broadcasters, Inc., 55 FCC 2d 819, 821-22 (1975).

involves analysis of a number of issues including: who has the power to direct the company's operations; who determines the make-up of the board of directors; whether a large minority shareholder also holds an influential executive post — in sum, who has the right to determine the company's basic policies.[15]

Accordingly, CIRI noted that the key to fulfilling the purpose behind the award of preferences and to deterring sham applicants is to require that minorities have actual control of the entity that is to receive a preference and that minorities hold a significant equity interest in that entity. While the Commission adopted a minority eligibility standard that reflects this principle, the Commission's short-form affirmation does not require documentation in support of an applicant's claim of preference eligibility, nor does it communicate to the applicant the gravity of the declaration being made.

In light of the complexity involved with adopting de facto control as an element of any qualification standard; CIRI has urged the Commission to require that the following elements be demonstrated and certified in a winning bidder's

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[15] See William S. Paley, 1 FCC Rcd 1025, 1026 (1986); Metromedia, Inc., 98 FCC 2d 300, 306 (1984), recon. denied, 56 R.R.2d 1198 (1985), appeal dismissed, California Ass'n of the Physically Handicapped v. FCC, 778 F.2d 823 (D.C. Cir. 1985); Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981).

long-form application to qualify the bidder for the license won at auction:

A. Minorities must have clear structural control over the applicant:

- in a limited partnership application, the minority must have general partner status and there must be substantial restraints on management control by any other general partner — partnership and management agreements must be filed with the application

- in a corporate application, minorities must at least possess 50.1 percent of the voting stock — shareholder records and voting trusts or agreements must be filed with the application

- in a consortium application, consortium agreements must be filed with the application.

B. Certain elements in an organizational structure which call into question the minority principal's involvement in the entity will disqualify the entity. For example, if non-minorities have the ability to "call" the minimum minority equity stake within a certain period (e.g., three years) or for a fixed or below market price, the applicant should not be considered eligible for minority preferences.

C. The Commission should make clear that if the applicant's statements are found to be false, the applicant (and its principals) will be subject to substantial penalties — both civil and criminal — as well as being disqualified from applying for any Commission license in the future. A warning such as the following (which is similar to that included in all FCC applications) should have a place of prominence in the "minority eligibility" certification block:

> WILLFUL FALSE STATEMENTS OR OMISSIONS MADE IN THIS APPLICATION, INCLUDING CERTIFICATION WITH RESPECT TO THE

APPLICANT'S ELIGIBILITY AS A MINORITY-CONTROLLED ENTITY, ARE PUNISHABLE BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18 SECTION 1001), CIVIL PENALTIES (U.S. CODE TITLE 47, SECTION 503), REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(A)(1)); AND/OR DISQUALIFICATION FROM HOLDING ANY OTHER LICENSES ISSUED BY THE FEDERAL COMMUNICATIONS COMMISSION.

D. Any attorney admitted to practice before the Commission under section 1.23 of the Commission's Rules shall be held to the standards of ethical conduct required of practitioners at the bar of any court of which he or she is a member. In principal, this means that an attorney who signs an application by a prospective minority-controlled entity certifies by his or her signature that he or she has read the application and that, to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the statements made in the application are well grounded in fact. Under sections 1.24 and 1.52 of its Rules, the Commission should censure, suspend, or disbar any attorney who fails to conform to this standard.

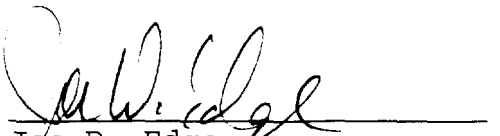
These requirements would be relatively simple to administer and would ensure that the preferences adopted to increase minority participation in telecommunications would in fact serve that purpose instead of inuring to the benefit of non-minority enterprises which purport to be eligible for minority preferences, but, in fact, are shams.

V. CONCLUSION

For the foregoing reasons, CIRI urges the Commission to reconsider the provisions adopted in the Second Report and

Order and adopt the measures recommended in this Petition.

Respectfully submitted,



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May 20, 1994

APPENDIX A

PROPOSED FCC REGULATIONS

§ 1 Social Disadvantage

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. For social disadvantage relating to Indian tribes and Alaska Native Corporations, *see* § 3(a).

(b) *Members of designated groups.* (1) In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: African Americans; Hispanic Americans; American Indians/Alaska Natives; Asian Americans/Pacific Islanders [*See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC Rcd 979 (1978).]

(2) An individual seeking socially disadvantaged status as a member of a designated group may be required to demonstrate that he/she holds himself/herself out and is identified as a member of a designated group if the FCC has reason to question such individual's status as a group member.

(c) *Individuals not members of designated groups.* An individual who is not a member of one of the above-named groups must establish his/her individual social disadvantage on the basis of clear and convincing evidence. A clear and convincing case of social disadvantage must include the following elements:

(1) The individual's social disadvantage must stem from his or her color, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause not common to small business persons who are not socially disadvantaged.

(2) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged.

(3) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

(4) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant.

(5) The individual's social disadvantage must have negatively impacted on his or her entry into and/or advancement in the business world. The FCC will entertain any relevant evidence in assessing this element of an applicant's case. The FCC will particularly consider and place emphasis on the following experiences of the individual, where relevant: